United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7132

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

RICHARD PITTMAN,

Plaintiff-Appellant,

-against-

EASTERN AIR LINES, INC.,

Defendant-Appellee,

ON APPEAL BY RICHARD PITTMAN FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT RICHARD PITTMAN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATUTE AND RULE

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Jurisdiction

This brief is submitted by plaintiff-appellant, (hereinafter referred to as PITTMAN) RICHARD PITTMAN, in support of his appeal from the Order of HONORABLE MARK COSTANTINO, United States District Judge for the Southern District of New York (16).

The Court below granted judgment in favor of defendant-appellee, EASTERN AIR LINES INC. (hereinafter referred to as EASTERN), dismissing the action filed by PITTMAN to set aside the arbitration award rendered by the arbitrators in August, 1975.

The opinion of Judge COSTANTINO was filed on February 9, 1976 and thereafter a decision and Order was rendered on March 11, 1976 denying reconsideration (21). PITTMAN filed Notice of Appeal (20). The record on appeal was transferred to the United States Court of Appeals for the Second Circuit on April 16, 1976. The jurisdiction of this Court rests on the Railway Labor Act 45 U.S. C. A. 159.

Statement of the Case

This appeal arises out of a dispute concerning the arbitration format as set forth in labor agreement entered into between International Association of Machinists and Aero Space Workers of which PITTMAN is a member, and EASTERN. The date is July 1974 and to run through December 31, 1975.

This proceeding was brought by PITTMAN in order to set aside the decision which was rendered by the arbitrators more than ten (10) days after the hearing was held. The contention of PITTMAN has been that inasmuch as the agreement which set up the machinery for the arbitration specifically called for the decision within ten (10) days after the hearing was concluded and this decision that was rendered by the Board was given more than a month after the hearing, the decision of the Board was null and void and a new arbitration was required together with reinstatement of PITTMAN together with back pay.

The decision of Judge COSTANTINO denied this and a Notice of Appeal was duly filed. The Record on Appeal was transferred to the United States Court of Appeals for the Second Circuit on April 16, 1976.

ISSUE PRESENTED FOR REVIEW

Was the rendering of the decision in conformity with the time limits as set forth in the Agreement, or was it rendered past the ten (10) day period, thus making the decision of the Board of Arbitration a nullity?

SUMMARY OF ARGUMENT

PITTMAN respectfully submits that the decision denying the dismissal of the action on the part of PITTMAN to nullify the award should be reversed and judgment should be entered in his favor to the extent of nullifying the arbitrator's award, reinstating him together with back-pay and setting down a new date for arbitration.

The uncontridicted evidence as set forth in the transcript of the proceedings specifically states that the hearing was concluded and that no further briefs, evidence or the like were to be submitted. Thus, the failure on the part of the arbitrator to render a decision in conformity with the agreement entered into between the parties which must be strictly construed has been violated on the part of the arbitrator for failure to comply.

STATEMENT OF FACTS

The International Association of Machinists and Aero-Space Workers who represent PITTMAN entered into an agreement with EASTERN with this agreement to run until December 31, 1975. This agreement was clear and specific in its setting up of machinery for handling disputes. Among its terms was the mandate that a prompt arbitration would take place and that upon the conclusion of the hearing within ten (10) days a decision would be rendered. Under the Railway Labor Act regardless of the feelings of the parties that an injustice has been rendered as a result of the arbitration award that could not be appealed. On the other hand, if the procedure was improperly followed, the Court was mandated to set aside the arbitration award. The evidence is uncontradicted as set forth in the transcript that the hearing that was held on July 17, 1975 was concluded that same day and that the final statements of the arbitrator on the bottom of page 92 state - "The record will speak for itself. Does either side have any further evidence or testimony that they desire to put on the record? Not hearing anything, I will declare the record closed in the matter number 365-75. Thereupon the hearing was concluded at 1:10 P.M."

It is the contention of PITTMAN that these clear and unambiguous words state that the hearing was concluded, that nothing further was to follow and that a decision must be rendered in accordance with Article #19, paragraph H of the

agreement referred to above wherein on page 70 the following was stated: " The decision of the Board shall be rendered within ten (10) days after the close of the hearing. The time limit specified in this Section may be extended by mutual agreement of the Board members." Thus, inasmuch as none of the Board members asked for additional time, nobody asked that additional documentation be produced, the decision had to be rendered within ten (10) days. It is further undisputed that the decision was not rendered within ten (10) days and that inasmuch as it was not rendered in accordance with the terms of the agreement, the decision is null and void.

The failure on the part of the arbitrators to ask for additional time nullifies the award.

POINT I

THE COURT ERRED IN INTERPRETING A LETTER RECEIVED FROM A UNION OFFICIAL COMPLAINING OF THE SLOWNESS OF DECISIONS.

In the decision of JUDGE CONSTANTINO he refers to a letter of February 3, 1975 from F. P. Coughlan, Vice President of the union to Mr. Sickles and other board arbitrators wherein the Court stated that the letter contained the following: "First, the date of receipt of the last documents to be regarded as the date of the close of the hearing and second, the transcript of the Board hearing may be the last document (the letter states "I have explained to my people the delaying actions sic caused by awaiting transcripts."

The letter has no relevency with regard to the contract and even if it did have relevency it is not being in context with in its full context and only portions are being used.

We first concern ourselves with the letter inspite of the fact that we feel it has no relevency whatsoever which shall be set forth hereinafter.

The paragraph that the Court below has found fit to straddle Appellent with says more than what it is quoted in the decision. The full sentence states as follows: "I have explained to my people the delaying actions caused by awaiting transcripts, briefs, depositions." The Court merely stated that the fact that the transcript was not delivered delayed the decision. The arbitrator at no time stated that

a decision could not be rendered as a result of a lack of a transcript. In fact, the arbitrator did not ask for a transcript to be sent to him, did not ask for briefs, did not ask for depositions. How can anyone interpret that line as stating that an indefinite period of time could elapse until a decision would be rendered by the arbitrator. In fact, as a future point will bring out, the final words of the arbitrator on page 92A of the transcript are as follows: "Not hearing anything, I will declare the record closed in matter number 365-75." Whereupon the hearing was concluded at 1:10 P.M. Had the arbitrator wished to delay his decision page 70 of the Contract has specific procedures to be followed and we quote: "The decision of the Board shall be rendered within ten days after the close of the hearing. The time limit specified in this Section may be extended by mutual agreement of the board members. " There is no claim or evidence whatsoever by the Respondent to show that such a request was ever made or granted.

This proceeding falls under the Railway Labor Act 45 USCA 159. The third section of the statute deals with impeachment of award. Subdivision A of that third section says "That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter."

It is quite obvious that the procedure was set

forth in a contract between the union and the Respondent and any deviation therefrom made the award a nullity. It has been held on innumerable occasions that the time limits must be strictly adhered to. In the case of BROTHERHOOD OF R. & S. Cl. etc. v. NORFOLK SO. RY. CO. 143 F. 2d 1015 at page 1017 the Court reitereated a standing interpretation of arbitration in which it stated, and we quote :"We must assume that Congress legislated here in the light of the common law. In several instances, Congress made express departures from rules of arbitration established by the common law. Arbitration deprives the judiciary of jurisdiction over the particular controversy and the Courts have long ruled that there must be strict adherence to the essential terms of the agreement to arbitrate. " Following that statement the Court went on to say "Time is of the essence in arbitration at common law and the absence of express word by Congress we cannot assume an intent to overrule this well established principal." Continuing the Court went on to re-emphasize the time of the essence. "Moreover, the statute is clear in its requirement that a time must be set out in the arbitration agreement in which the award must be made and filed." Again continuing further on,"The provision requiring a time limit to be set forth in written agreement of the parties would seem to be mandatory." The Court cited ATCHISON T. & S. F.RY. v. BROTHERHOOD etc. 7 Cir. 26 F 2d 413, 419 and the Court again re-emphasized the

point "It would hardly be proper to presume that while it was mandatory that the limitation in time appear in the agreement, it was directory merely in its requirement that the award be so made and filed."

We again refer to the agreement between the union and the Airline, Respondent, wherein a provision was made for the extending of time by all the arbitrators agreeing to do so. This was not done and again in the case of BROTHERHOOD et al. v. NORFOLK previously cited, at page 1018 the Court stated and we quote. "It is rather striking that Congress in the act, provided one and only one method of extending the time in which the award must be filed - the agreement of the parties to the arbitration. This provision, we think, denies such power to the arbitrators. Expressio unius est exclusio alterus. Here the arbitrators made no order extending the agreed time. " This last sentence is applicable directly to the within proceeding. Further on down the page, the following is stated by the Court. "The case becomes a simple one, if it be remembered that the award of the arbitrators is binding only if reduced to writing and filed as required both by the Railway Labor Act and the arbitration agreement." Th[illegible], this decision cannot be held to be binding upon the Appellant as the agreement is the bible upon which the award rests. No deviation from this agreement can be tolerated or tempted by any of the parties. A letter no matter from whom it is

derived cannot in any way alter the terms of the agreement. Furthermore, no reference at any time was made to that agreement or any extensions. At no time did the Appellant agree to extensions of time.

POINT II

ARBITRATOR HIMSELF CLOSED THE HEARING THUS PRECLUDED ANY FURTHER DOCUMENTS FROM BEING CONSIDERED

If the arbitrator or anybody else had wished to submit any further documentation including the transcript for consideration, it was encumbent upon the party to make that request at the hearing. The arbitrator himself at determination of the proceeding on page 92 of the transcript, the last two lines, as well as the final four which to on to the next page preclude the arbitrator from accepting any further or asking for anything further and we quote him wherein he states "The record will speak for itself. Does either side have any further evidence or testimony that they desire to put on the record? Not hearing anything, I will declare the record closed in matter number 365-75.Whereupon the hearing was concluded at 1:10 P.M." Although the hearing was concluded a brief exchange took place thereafter in which counsel for Appellant specifically called attention to the fact to the arbitrators that time was important due to the fact that the Appellant had been out of work for a

number of month as a result of the dispute and was unable to obtain employment as a result of the dispute. Although the record does not indicate this no denial will be made by any of the participants in the arbitration.

The Court exceeded it's authority by sustaining the award as it was contrary to the terms of the agreement and thus, when the award was made by two to one majority it was a nullity in that it had to be made within the ten day period from the closing of the hearing rather than the waiting for the transcript.

POINT III

CONTRACT ENTERED INTO ON JULY 11, 1974 COULD NOT BE MODIFIED EXCEPT IN THE MANNER PRESCRIBED IN THE AGREEMENT.

Page 98 of the agreement, article 30 talks of the duration of the agreement and covers modifications if any be made. The second paragraph states as follows:"This entire agreement shall continue in full force and effect through December 31, 1975 and thereafter shall be subject to changes as provided for in Section 6, Title I of the Railway Labor Act, as amended. Either party requesting re-negotiation of all or any part of this agreement shall serve notice on the other party at least sixty days prior to December 31, 1975." Thus reference again is made to the alleged modification by the letter. This is unacceptable as it was not done in the manner prescribed by the contract.

Unless it conforms with that procedure it is a nullity. The Courts have continuously upheld this proposition. In the matter of McCOY v. ST. JOSEPHS RAILWAY, 229 MOAPPD 506, 77 SW 2d, 175, the Court stated: "Where the Court considered that a collective labor agreement was in effect it could not be terminated except according to its terms. It could not be modified to the detriment of the employee through unauthorized adjustment of seniority rights between the union and the employer. Thus, it is quite the same situation that we have here. The modification could not be made of the Labor Agreement. In fact, the statute itself that is the Labor Railway Act at 45 USCA 151 through 188 in Section 152, the seventh paragraph, it stated as follows: "No carrier, its officers or agents, shall change the rate of pay, rules or working conditions of the employee as a class embodied in the agreement, except in the manner prescribed in such agreement." Thus, once again under the statute a modification of the agreement could not be made without the adherence to the conditions as set forth in the agreement of July 11, 1974. At 29 USC 158 paragraph D the following is stated: "No party shall terminate or modify the agreement unless the (1) gives written notice to the other party proposing the termination or modification sixty days before expiration date. (2) Offers to mediate and confer with the other party to negotiate a new contract or a modified contract and (3) gives thirty days."

CONCLUSION

Arbitration is a creature of statute and as such is strictly regulated by statute. In the instant matter, application of the statute reveals that a failure on the part of the arbitrator in conforming to the agreement that set him up as an arbitrator, is fatal. The agreement specifically stated that the decision of the arbitrator must be rendered within ten days after the hearing was concluded. The arbitrator himself concluded the hearing on the 17th of July, 1975. Therefore, the decision had to be rendered by the 27th of July. Failure to render the decision by the 27th of July rendered the decision of the arbitrator a nullity. In fact, had the arbitrator's decision been in favor of the plaintiff, Pittman, it, too, would have been a nullity. Thus, regardless of what the decision was it was a nullity at the time that it was rendered.

There is no question that the basis for the arbitrator's decision cannot be appealed in spite of the fact that the plaintiff feels that it was against the weight of evidence, but the law is quite clear that the arbitration being a deprivation of the accessability to the courts mandates that it must be stricktly construed. Thus, any deviation renders the arbitration a nullity. Under the circumstances the plaintiff appellant should be reinstated together with back pay and the new arbitration be ordered.

Dated: Rockville Centre, New York, May 19, 1976.

Respectfully submitted,

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